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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

IN THE MATTER OF CITY OF COLUMBUS

vs.

HENRY R. HAYES

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Henry R. Hayes, petitioner herein, prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Ohio entered in the case of City of Columbus vs. Henry R. Hayes, on May 31, 1967, being Case Number 40794.

OPINIONS BELOW

The journal Entry of judgment of Conviction of the Columbus Municipal Court, Franklin County, Ohio, is unreported and appears in the transcript of the record.

The opinion of the Court of Appeals of the 10th Judicial District of Ohio (Franklin County) is reported and appears herein as Appendix A.

The dismissal of the appeal by the Supreme Court of Ohio is unreported and is printed herein as Appendix B.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on May 31, 1967. The Jurisdiction of the Court is invoked under 28 USCA Section 1257 (2 & 3).

QUESTIONS OF LAW PRESENTED

1. DO THE PRINCIPALS ENUMERATED PERTAINING TO CONSTITUTIONAL LIMITATIONS ON CUSTODIAL INTERROGATION UNDER MIRANDA V. ARIZONA (1966) 384 US. 436, APPLY TO MISDEMEANORS?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fifth Amendment of the Constitution of the United States of America.
2. Section 2133.01 of the Columbus Municipal Code. (Appendix C)

2133.01 Driving while drunk or drugged; evidence.

No person who is under the influence of intoxicating liquor, alcohol, narcotic drugs,, hypnotic drugs,, or opiates, shall operate any motor vehicle, trackless trolley or any other vehicle.

STATEMENT OF THE CASE

The Defendant was arrested on the 12th day of January, 1966, in the City of Columbus, and charged with violating Section 2133.01 of the Columbus Municipal Code, being more commonly referred to as operating a motor vehicle while under the influence of alcohol.

The Defendant was taken to Police Headquarters where he was asked by the arresting officer if he would take cer-

tain tests. The Defendant replied to the officer that he would like to use the telephone to call a lawyer or a bondsman. The police officer ignored the request of the Defendant and proceeded to give certain tests to the Defendant, such as a coin test. The Defendant was told that he could use the telephone later, after the officer was finished questioning him. The Defendant gave a urine test, and then he was permitted to use the phone to call a lawyer.

The Defendant made a motion to suppress the physical and chemical test, and said motions were overruled by the Trial Court. The Defendant was found guilty by a jury of said offense and appealed all the way through the State Courts and is now before this Court on the alleged error.

REASONS FOR GRANTING THIS WRIT

The Supreme Court of the State of Ohio, by dismissing the appeal of this petitioner, has, upon execution of his sentence, deprived the petitioner of his liberty without due process of law.

ARGUMENT

1. DO THE PRINCIPLES ENUMERATED PERTAINING TO CONSTITUTIONAL LIMITATIONS ON CUSTODIAL INTERROGATION UNDER MIRANDA V. ARIZONA (1966) 384 U.S. 436 APPLY TO MISDEMEANORS?

On page 3 of the Bill of Exceptions, the Defendant-Appellant through his attorney made a motion to examine the Police Officer, John Hawks, as on voir dire examination and of the Defendant, Henry Hayes with respect to a violation of his constitutional rights pertaining to a certain urinalysis test and physical test and all conversation with the arresting officer. The motion was overruled, (Bill of Exceptions, Page 13, Line 30). The Defendant was first called

to the stand and he stated that at the time of his arrest he was asked if he would take a test and he told the officer he would like to use a telephone to get a lawyer or a bondsman, (Bill of Exceptions, Page 4, Line 20). Defendant further testified (Bill of Exceptions, Page 5, Line 9), that he was told that he could not use a phone until after he was finished being interrogated by the arresting officer. The Defendant further stated on page 5 of Bill of Exceptions, Line 22, that he took the test but that he did not want to, but he agreed and was cooperative at the time. The Defendant further testified on Page 7 of the Bill of Exceptions, Line 23, that he asked to see an attorney. The officer stated (Bill of Exceptions, page 9, Line 18), that the defendant told the officer that he was a retired Colonel and he was well aware of his Constitutional rights. The officer by his own testimony also said on Page 9 of the Bill of Exceptions that no further mention was made of an attorney until after the interrogation. This would appear by the officer's own testimony that he did not inform the defendant that he was entitled to an attorney and that he was entitled not to make any statement until after he had talked to an attorney. The officer denies that the defendant requested a lawyer as alleged by said defendant. I think the entire reading of the record is quite clear that the defendant was not advised by the officer that any statements he made could be used against him, or that any chemical test submitted to by the defendant could be used against him. Defendant at this time cites to the Court the case of *Miranda vs. State of Arizona,* decided June 13, 1966, and cited as 16 L ed 2d 694, where in that case the defendant was arrested by the police and taken to a special interrogation room where he signed a confession which contained a typed paragraph stating that the confession was made

voluntarily with full knowledge of his legal rights and the understanding that any statements he had made might be used against him. This Court reversed the Supreme Court of Arizona holding that the defendant's confession was inadmissible because he was not in any way apprised of his right to counsel nor was his privilege against self-incrimination effectively protected in any other manner. Again in the case of *Michael Vignera vs. State of New York,* 16 L ed 2d 694, the defendant made an oral confession to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. At his trial in a New York State Court on a charge of robbery, the defendant was precluded from making any showing that warnings of his right to counsel and his right to be silent had not been given. The Supreme Court of the United States reversed on the grounds that the defendant was not warned of any of his rights before the questioning by the police and by the assistant district attorney, and that no other steps were taken to protect these rights. Again in the *Westover vs. United States,* 16 L ed 2d 694, the defendant was arrested by Kansas City Police as a suspect in Kansas City robberies, and was interrogated in the private interview room of the police department for a lengthy period. He was then handed over to FBI and interrogated by three special agents, who after some two hours obtained two signed confessions to each of two California robberies. These confessions were admitted in evidence, he was convicted of the California robberies. On certiorari, this Court reversed on the grounds that the defendant did not knowingly and intelligently waive his right to remain silent and his right to consult with counsel prior to the time he made the confessions, since the interrogations, though conducted

by two legally distinct law enforcement authorities, had the impact on him of a continuous period of questioning. *State of California vs. Stewart*, 16 L ed 2d 694, wherein the confession of the defendant was introduced in evidence. He was convicted, but on appeal the Supreme Court of California reversed, holding that the confession was not admissible because defendant should have been advised of his right to remain silent and of his right to counsel. The Supreme Court of the United States affirmed on the ground that the Court would not presume that the defendant had been effectively apprised of his rights, on a record which did not show that any warnings had been given or that any effective alternative had been employed.

All of the above cases were decided at the same time and it would appear that the following have developed as the law with respect to defendant's constitutional rights.

1. Any questioning of an individual held for interrogation by a law enforcement officer must be warned in clear and unequivocal terms, that he has a right to remain silent, and that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

2. That a defendant may waive his rights to remain silent and to be assisted by counsel provided the waiver is made voluntarily, knowingly and intelligently.

3. If an individual held for interrogation by a law enforcement officer indicates in any manner and at any stage of the proceedings that he wishes to consult with an attorney before speaking, there can be no questioning.

4. If an individual held for interrogation by police indicates in any manner, at any time, prior to or during questioning, that he wishes to remain silent, the interrogation must cease.

5. The mere fact that an individual held for interrogation by a law enforcement officer may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further questioning until he has consulted with an attorney and thereafter consents to be questioned.

6. The American accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the expedient of compelling it from his own mouth.

7. The privilege against self incrimination is satisfied only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will.

8. A defendant's constitutional rights are violated if his conviction in a federal or state court, is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity; this is so even if there is ample evidence aside from the confession to support the conviction.

In the instant case here it is apparent that the defendant did not wish to consider giving a test until after he consulted with his attorney. It is further evident that after the defendant gave the test as evidenced from the record he was allowed to make a call to his attorney. It is easy to see that he did call an attorney as soon as the urinalysis test was submitted to. The question is raised that why would the defendant not desire an attorney as testified to by the officer and then after giving the urinalysis test demand to call an attorney immediately.

It would appear from the holding of the *Miranda* case that the defendant's right to remain silent does not depend upon whether he is aware of his rights without a warning

being given. It would further appear that the defendant's failure to ask for a lawyer does not constitute a waiver of his right. It appears that it must be an open and intelligent waiver. The *Miranda* case further held that the absolute requirement of informing a person held for interrogation by a law enforcement officer of his right to counsel with a lawyer and to have the lawyer with him during interrogation cannot be met by any amount of circumstantial evidence that he may have been aware of this right. It would appear that the police officer in the instant case, if his testimony is taken as true, that the defendant says that I know of my rights, I was a retired Air Force Colonel, this would be circumstantial evidence in that the arresting officer felt that the defendant knew of his rights and was not apprised of his rights any further by the officer. This would not amount to an intelligent and an informed waiver of defendant's right to counsel.

It is further evident from the *Miranda* case that a heavy burden rests on the State to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retain or appoint counsel. This waiver will not be presumed simply from a silence of the individual after warnings are given by the police or simply from the fact that a confession was eventually obtained. From all of the facts in the instant case it would appear that there was not an intelligent and informed waiver by the defendant in the instant case. It would appear from an entire reading of the record that upon the examination that the defendant would not have taken a test if not prompted by the arresting officer. It would further appear that the arresting officer under the terms of the *Miranda* case when informed by the defendant that he requested to call an attorney, should have ceased

any further interrogation or any further attempts to secure any type of tests whatsoever from said defendant.

CONCLUSION

The Constitutional and Statutory rights of the petitioner were denied by the Columbus Municipal Court, and also by the Court of Appeals of Franklin County, Ohio, and the Supreme Court of Ohio, and this case should be reviewed by this Court so that the substantial constitutional questions and the questions of public and great general interest can be determined.

Respectfully submitted,

JOSEPH H. HANS
297 South High Street
Columbus, Ohio 43215
Attorney for Petitioner.

EXHIBIT A

APPENDIX A

R-28—COURT OF APPEALS—File 363

9 Ohio App. 2d] COLUMBUS *v.* HAYES.

CITY OF COLUMBUS, APPELLEE, *v.* HAYES, APPELLANT.

[Cite as City of Columbus v. Hayes, 9 Ohio App. 2d .]

Criminal procedure—Custodial interrogation—Statements obtained—Admissibility in evidence—Misdemeanors—Denial of counsel—Interrogation against will—Factors in determining whether statements involuntary.

1. The punishment which may be imposed for the offense of operating a vehicle while under the influence of alcohol is not, at present, sufficient to bring that offense within the constitutional limitations on custodial interrogation under *Miranda v. Arizona* (1966), 384 U. S. 436.
2. The denial of the right to counsel, interrogation against the will of the accused, and similar practices are proper factors in determining whether a statement is involuntary and entitled to be excluded on that ground.

(No. 8457—Decided January 3, 1967.)

APPEAL: Court of Appeals for Franklin County.

Mr. John C. Young, city attorney, *Mr. Gordon L. Sroufe* and *Mr. J. Larry Lacksen,* for appellee.

Mr. Joseph H. Hans, for appellant.

Per Curiam. This is an appeal from the Municipal Court of Columbus. Appellant was convicted of operating a vehicle while under the influence of alcohol.

The first assignment of error relates to the trial court's refusal to suppress test results and testimony as to state-

ments of appellant. Reliance is placed on *Miranda v. Arizona* (1966), 384 U. S. 436, 16 L. Ed. 29 694, 86 S. Ct. 1602. In our opinion, the punishment for the offense charged is not now such as to bring this case within constitutional limitations on custodial interrogation. Of course, the denial of the right to counsel, interrogation against the will of the accused, and similar practices are proper factors in determining whether a statement is involuntary and entitled to be excluded on that ground. However, in the present case, we find no error in admitting the evidence.

The second assignment relates to exclusion of questioning as to a presumption contained in the Columbus ordinance. We find no prejudicial error.

The judgment of the Municipal Court will be affirmed.

Judgment affirmed.

DUFFY, DUFFEY and TROOP, J.J., concur.

EXHIBIT B

APPENDIX B

THE SUPREME COURT OF THE STATE OF OHIO

No. 40794

1967 Term

To wit: May 31, 1967

THE STATE OF OHIO,
City of Columbus.

CITY OF COLUMBUS,
Plaintiff-Appellee,

vs.

HENRY R. HAYES,
Defendant-Appellant.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled Costs:

Motion Fee, $20.00, paid by Joseph H. Hans.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court this..... day of ..... 19....

.....Clerk

.....Deputy

APPENDIX C

2133.01 Driving While Drunk or Drugged; Evidence

No person who is under the influence of intoxicating liquor, alcohol, narcotic durgs, hynotic drugs, or opiates, shall operate any motor vehicle, trackless trolley or any other vehicle.

EXHIBIT A

APPENDIX D

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 8457

CITY OF COLUMBUS,

Plaintiff-Appellee,

vs.

HENRY R. HAYES,

Defendant-Appellant.

ENTRY

This cause came on for hearing on the briefs and argument of counsel and the Court being fully advised in the premises finds that there is no error prejudicial to Defendant-Appellant.

It is, therefore, adjudged and decreed that the judgment of the Columbus Municipal Court be affirmed at Defendant-Appellant's costs, exceptions reserved.

It is further ordered that this cause be remanded to the Columbus Municipal Court for enforcement of sentence.

.....

Judge

.....

Judge

.....

Judge

Approved:

JOHN C. YOUNG, *City Attorney*

GORDON L. SHOUPE, *City Prosecutor*

J. LARRY LACKSEN, *Asst. City Attorney*

Attorneys for Plaintiff-Appellee.

JOSEPH H. HANS

Attorney for Defendant-Appellant.

APPENDIX E

IN THE MUNICIPAL COURT OF THE CITY OF COLUMBUS, OHIO

Case No. 1349-50

CITY OF COLUMBUS,
Plaintiff-Appellee,

vs.

HENRY R. HAYES,
Defendant-Appellant.

NOTICE OF APPEAL

The defendant in the above entitled action hereby gives Notice of Appeal to the Court of Appeals of Franklin County, Ohio, from the judgment entered on the 31st day of May, 1966, wherein the trial court overruled the defendant-appellant's motion for a new trial and further, wherein the Municipal Court, City of Columbus, Ohio, entered a judgment of guilty against the defendant. This appeal is on question of law.

JOSEPH H. HANS
297 South High Street
Columbus, Ohio 43215
Attorney for the Defendant-Appellant.

APPENDIX F

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Case No. 8457

CITY OF COLUMBUS,
Plaintiff-Appellee,

vs.

HENRY R. HAYES,
Defendant-Appellant.

PROOF OF SERVICE

Now comes the Appellant and gives notice of appeal from the judgment and final order entered in the Court of Appeals of Franklin County, Ohio, Tenth Appellate District, on the eleventh day of January, 1967, wherein the Court of Appeals affirmed the judgment of the Municipal Court, finding the Defendant guilty. The case did not originate in the Court of Appeals, but does involve a substantial Constitutional question.

JOSEPH H. HANS
297 S. High Street
Columbus, Ohio 43215
Attorney for Defendant-Appellant.

NOTICE OF APPEAL

This is to certify that a copy of the foregoing notice was served on John C. Young, City Attorney, City Hall, Columbus, Ohio, Counsel for the Plaintiff-Appellee, on the ..... day of January, 1967.

Attorney for the Defendant-Appellant,
JOSEPH H. HANS